Quarry Workers Local 829, affiliated with the Laborers International Union of North America, AFL–CIO *and* Mississippi Lime Company and United Steelworkers of America, Local 169, AFL–CIO, CLC. Case 14–CD–976

September 27, 2001

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

The charge in this Section 10(k) proceeding was filed November 19, 1998, by Mississippi Lime Company (the Employer) alleging that the Respondent, Quarry Workers Local 829, affiliated with the Laborers International Union of North America, AFL–CIO (Laborers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by the United Steelworkers of America, Local 169, AFL–CIO, CLC (Steelworkers). The hearing was held December 17–18, 1998, before Hearing Officer Lynette K. Zuch.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Missouri corporation, with an office and place of business in St. Genevieve, Missouri, is engaged in the mining and production of lime. During the last 12 months, which period is representative of its operations, the Employer sold and shipped from its St. Genevieve, Missouri facility goods valued in excess of $50,000 directly to points located outside the State of Missouri. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Laborers and Steelworkers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer mines limestone and produces lime and related products at its St. Genevieve, Missouri facility. The Employer's current operations stem from its acquisition of the St. Genevieve Lime & Quarry Company and the Peerless White Lime Company, sometime around 1947 or 1948. Immediately after this acquisition, the Employer operated three divisions—the Mississippi Division (the original Company), St. Genevieve, and Peerless. In 1960, the Employer folded the St. Genevieve Division into the Peerless Division, leaving Peerless and Mississippi as the Employer's two remaining divisions.

The Laborers have represented the employees of Peerless White Lime Company and the St. Genevieve Lime & Quarry Company (until the consolidation of St. Genevieve with Peerless), since 1937.[1] See *Peerless White Lime Co.,* 10 NLRB 933, 938 (1939); *Mississippi Lime Co.,* 124 NLRB 884, 885 fn. 3 (1959) (citing Case 14–RD–17). The Steelworkers have represented employees at the Mississippi Division since 1954.[2] See *Mississippi Lime Co.,* 124 NLRB at 885 fn. 3 (citing Case 14–RC–2593); and Case 14–RC–4841 (1964).

The Employer mines limestone at both its Peerless and Mississippi mines. The limestone is transported to other onsite facilities for processing into lime and other end products. Onsite facilities include a stone-crushing plant, storage areas for the crushed stone, and kilns.

Kilns are furnaces which heat limestone and change the stone to lime. The Employer's kilns are classified generally as either "vertical" or "rotary" (rotary kilns are also referred to as "horizontal"). Vertical kilns are loaded with limestone at the top and the finished product is discharged at the bottom. Rotary kilns are loaded with limestone at one end of a horizontal tube and the finished product is discharged at the opposite end. The Employer uses vertical kilns to generate specialized lime products that command higher margins. Rotary kilns are used to produce commodity products.

At the Mississippi plant there are 6 rotary kilns and 20 vertical kilns, 13 of which are currently being operated. There are six rotary kilns at the Peerless facility. Although vertical kilns had operated at the Peerless facility, the Employer shut down the vertical kilns at Peerless in 1954 and at the St. Genevieve Division a few years later.[3]

During the 1990s, the Employer embarked on a series of modernization projects to improve its competitive position. For instance, it has automated its stone and coal handling systems at its Peerless rotary plant as well as its kiln control room at the Mississippi rotary plant. Most significantly, and central to this jurisdictional dispute, the Employer announced in April 1997, that it would construct a new "Maerz vertical kiln," which is

[1] During this period, Laborers Local 829 was referred to as the International Hod Carriers, Building & Common Laborers Union of America, Local No. 829.

[2] During this period, Steelworkers Local 169 was known as St. Genevieve Local 169, affiliated with United Glass and Ceramic Workers of North America, AFL–CIO.

[3] The Employer's director of lime and limestone production, Steven Phagan, testified at the hearing that this closure took place in approximately 1958 or 1959.

more automated, more efficient, and has higher productive capacity, than its existing vertical kilns.

Both Unions sought to have the operation and maintenance of the Maerz vertical kiln assigned to the employees they represent. Following an informal hearing conducted by the Employer, the Employer announced on May 21, 1998, that it was awarding the Maerz kiln work to the employees represented by the Laborers.

On May 29, 1998, the Steelworkers filed a grievance claiming that the assignment of the Maerz vertical kiln work to the Laborers violated the collective-bargaining agreement between the Steelworkers and the Employer and that the assignment deviated from past practice. The Employer denied the grievance on June 10, 1998, and on September 28, 1998, the Steelworkers moved for arbitration. In response, the Laborers sent a letter to the Employer dated October 8, 1998, stating:

> [The Laborers] regard[] this dispute as extremely serious. Therefore, this is to advise you that if the company proceeds to arbitration with the Steelworkers or takes any other action to reassign work on the Maerz Kiln from employees represented by Laborers' 829 to employees to employees [sic] represented by the Steelworkers, Laborers' 829 will have no choice but to picket and/or strike in protest.

The Employer filed an 8(b)(4)(D) charge against the Laborers on November 19, 1998.

B. Work in Dispute

The disputed work involves the operation and maintenance of the Maerz vertical kiln at the Employer's St. Genevieve, Missouri facility.

C. Contentions of the Parties

The Parties stipulated that the Steelworkers and Laborers both claim the work in dispute. The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated on the basis that the Laborers' letter of October 8, 1998, contained a threat to disrupt the Employer's production if the disputed work was reassigned. The Employer further contends that the disputed work should be awarded to employees represented by the Laborers based on the following: (1) employer preference, (2) economy and efficiency of operations, (3) the Laborers' loss of jobs over the past 25 years and past allocation of capital improvements, and (4) the company practice in making work assignments.

The Laborers agree with the Employer's reasons for awarding the work to employees they represent, but also rely on their certification and collective-bargaining agreement.

The Steelworkers assert that the Board should award the disputed work to employees they represent based on: (1) the Steelworkers' certification, (2) the history of the employees it represents in performing vertical kiln work, (3) geographical considerations showing the location of the disputed work at a site historically maintained and served by Steelworkers-represented employees, and (4) the long-term trend showing the Employer's business changes over time resulting in the assignment of vertical kiln work to the Steelworkers unit.

D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that a party has used proscribed means to enforce its claim, and that there are competing claims to disputed work between rival groups of employees.

As described above, after the Employer awarded the operation and maintenance of the Maerz vertical kiln to employees represented by the Laborers, the Steelworkers filed a grievance protesting the assignment. Subsequently, as a result of that grievance, the Laborers sent a letter to the Employer stating that the Laborers will picket and/or strike if the Employer took action to reassign the work on the Maerz kiln from the Laborers to the Steelworkers. Based on this evidence, we conclude that there are active competing claims to the disputed work between rival groups of employees, and that there is reasonable cause to believe that the Laborers have used proscribed means to enforce their claim.[4]

Finally, the parties stipulate that there exists no agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we conclude that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting),* 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and ex-

[4] At the hearing, the Steelworkers contended that the Laborers' threat to picket and/or strike was not a genuine threat because the Laborers' contract contains a no-strike clause. However, the Steelworkers have not repeated this contention in their brief. In any event, the existence of a no-strike clause in a union's collective-bargaining agreement is not a basis for finding that the union's threat is a sham. See, e.g., *Lancaster Typographical Union 70*, 325 NLRB 449, 451 (1998).

perience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction),* 135 NLRB 1402 (1962).

The following factors are relevant in deciding this dispute.

1. Certification and collective-bargaining agreements

The Laborers were certified as the exclusive bargaining agent for hourly paid production and maintenance employees of the Peerless and St. Genevieve Divisions, and the River Boat Dock and Loading Facility, of the Mississippi Lime Company. See Case 14–RD–17 (Aug. 18, 1949); *Mississippi Lime Co.,* 124 NLRB 884, 885 (1959) (Cases 14–RM–192 and 14–RM–193); and Case 14–RC–6075 (Dec. 6, 1968). The Steelworkers were certified as the exclusive collective-bargaining agent for all hourly paid production and maintenance employees at the Rotary and Maintenance Shop, at the Vertical Plant, and at the Mississippi Mine operated at the Mississippi Division of the Mississippi Lime Company. See Case 14–RC–2593 (Dec. 23, 1954); Case 14–RC–3597 (June 29, 1959); *Mississippi Lime Co.,* supra, Cases 14–RM–192 and 14–RM–193); and Case 14–RC–4841 (July 13, 1964). The collective-bargaining agreements adopt the language of the certifications.

Neither the certifications nor the collective-bargaining agreements of the Steelworkers and the Laborers mention the Maerz vertical kiln. Contrary to the Steelworkers' contention, the term "Vertical Plant" in the Steelworkers' certification and contract does not favor awarding the work to the employees it represents. The evidence fails to show that the Maerz vertical kiln is located in the Vertical Plant, and employees represented by the Laborers have performed vertical kiln work in the past. Accordingly, we find that this factor does not favor an award of the disputed work to employees represented by either Union.

2. Employer preference

The Employer prefers that the disputed work be assigned to employees represented by the Laborers. Accordingly, we find that this factor favors an award of the disputed work to employees represented by the Laborers.[5]

3. Area and industry practice

Neither Union has asserted any area or industry practice that would be relevant to determining an award of the disputed work. Accordingly, we find that this factor does not favor an award of the disputed work to employees represented by either Union.

4. Relative skills and training

The Steelworkers assert that this factor favors the employees they represent because those employees have been exposed to computer technology since the introduction in 1997 of a computerized control room for the Mississippi rotary kilns. The Steelworkers assert that while there was also some automation of the Peerless rotary plant, there was no comparable computerization of the Peerless rotary kilns staffed by Laborers-represented employees.

However, the evidence shows that the skills of both groups of the Employer's employees are substantially similar, and that the Maerz vertical kilns employ a new technology that would require 6 weeks of training for any employee to operate. Accordingly, we find that this factor does not favor an award of the disputed work to employees represented by either Union.

5. Economy and efficiency of operations

The Employer's director of lime and limestone production in the Ste, Genevieve, Missouri plant, Steven G. Phagan, testified that economy and efficiency of operations would be promoted by integrating the Maerz vertical kiln into the Peerless Division. In support, he cited the fact that the stone for the Maerz kiln comes from the Peerless mine and that the conveyors, storage facilities, and electrical substation that service the Maerz kiln are within the Peerless Division.[6] Phagan testified that, by keeping the work within this one division, the Employer can streamline communications and maintain only one maintenance crew and one set of supervisors for the integrated Peerless Division operation.

The Steelworkers contend that the Maerz vertical kiln is not fully integrated and that its product may be directed for further processing to Steelworkers-represented employees.

We find, on balance, that the factor of economy and efficiency of operations favors an award of the disputed work to the employees represented by the Laborers, as currently assigned.

6. Employer past practice

The Employer contends that its past practice is to award work on "capital" projects to the employees of the

[5] The Board does not generally examine the reasons for an employer's preference unless there is evidence that the employer was coerced into its preference. While the Steelworkers have questioned the reasons offered by the Employer for its preference, there is no claim, or evidence, that the Employer's preference was not reflective of a free and unencumbered choice. See, e.g., *Longshoremen ILWU Local 50 (Brady-Hamilton Stevedore Co.),* 223 NLRB 1034, 1037 (1976), reversed on other grounds 244 NLRB 275 (1979).

[6] A central storeroom, staffed by employees represented by the Steelworkers, serves both divisions.

division in which the project is most integrated. The Laborers contend that the Employer's past practice is to make assignments that correspond with the legal boundaries of the divisions. The Steelworkers contend that the Employer's practice is to award vertical kiln work to employees it represents. Each party introduced testimony to support its respective contention.

On the record here, we are unable to discern a uniform past practice that would provide a basis for finding that this factor favors an award to one group of employees over the other group.

7. Loss of jobs

The Employer argues that the Laborers have borne the disproportionate brunt of job cuts over the past 30 years and that during the 1990s it made 81 percent of its capital improvements to plants in the Mississippi Division, whose employees are represented by the Steelworkers. The Employer contends that awarding the disputed work to Laborers-represented employees will redress this imbalance.

The Steelworkers argue that this factor does not favor an award to either group of employees. The Steelworkers assert that its unit would lose employees in the short run if the award were to the Laborers, and also in the long run if, as an Employer representative testified, the future is in Maerz kilns rather than in Mississippi Division vertical kilns. However, the Steelworkers contend that it cannot be established at this time what the net effect of the assignment would be on the size of either unit.

We find that it is not clear, based on the record evidence, that an award to one group of employees would bring about a significant loss of employment for the other group. Accordingly, we find that this factor does not favor an award of the disputed work to employees represented by either union.

Conclusions

After considering all the relevant factors, we conclude that the employees represented by Quarry Workers Local 829, affiliated with the Laborers International Union of North America, AFL–CIO are entitled to perform the work in dispute. We reach this conclusion relying on employer preference, and economy and efficiency of operations.

In making this award, we are awarding the work to employees represented by Quarry Workers Local 829, affiliated with the Laborers International Union of North America, AFL–CIO not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of the Mississippi Lime Company represented by the Quarry Workers Local 829, affiliated with the Laborers International Union of North America, AFL–CIO are entitled to operate and maintain the Maerz vertical kiln at the Employer's St. Genevieve, Missouri facility.